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A Proposal to Eliminate a Black Market for Children

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— Note —

A PROPOSAL TO ELIMINATE A BLACK MARKET FOR CHILDREN

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INTRODUCTION

Typically, “rehoming” is a term that refers to giving away a pet after the original owner realizes that he or she is unable to fulfill his or her responsibilities to the animal.¹ In September 2013, Reuters news agency released an investigative report, entitled *The Child Exchange*,

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1. “The term ‘rehoming’, a term typically used by pet owners seeking new homes for their pets, has become widely used to describe the behavior of . . . parents who [seek] to relinquish care of their adopted children outside the purview of the courts or public child welfare agencies.” *Testimony from Joo Yeun Chang on Child Trafficking and Private Re-homing*, OFFICE OF LEGISLATIVE AFFAIRS AND BUDGET, ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP’T OF HEALTH AND HUMAN SERVS. [hereinafter Chang] (last visited May 1, 2016), <http://www.acf.hhs.gov/programs/olab/resource/testimony-from-joo-yeun-chang-on-child-trafficking-and-private-re-homing> [<http://perma.cc/U37Z-HVR3>]. For purposes of this Note, ‘rehoming’ refers to an “[u]nregulated custody transfer. . . intended to forego the responsibility of parenting by intentionally circumventing the child protection agencies and courts [that are] set up to be the proper channels for approvals of such custody transfers.” EVAN B. DONALDSON ADOPTION INST., RESPONDING TO REHOMING: PROTECTING CHILDREN & STRENGTHENING ADOPTIVE FAMILIES 2 (2015).

which informed the public about the rehoming of adopted children.² The report focused on a number of children who had been rehomed, parents who had rehomed their adopted children, and families that had taken custody of these children through the process of rehoming.³

In essence, the report shed light on a procedure where adoptive parents transferred the custody of their adopted child, without any oversight by any authority or government agency, through a power of attorney.⁴ As the Reuters report explained:

Through Yahoo and Facebook groups, parents and others advertise the unwanted children and then pass them to strangers with little or no government scrutiny, sometimes illegally . . . It is a largely lawless marketplace. Often, the children are treated as chattel, and the needs of parents are put ahead of the welfare of the orphans they brought to America.⁵

The rehoming procedure described in the article is as follows: (1) the adoptive parents post a request on rehoming webpages asking for someone to take the adopted child; (2) once they find a willing party, they give the child to the new party with a power of attorney document, which is simply “signed by the old parents and the new guardians, and witnessed by a notary.”⁶ Disturbingly, in instances of rehoming, the power of attorney document “is filed nowhere; it functions, in essence, as a receipt.”⁷

Adoption law is largely a product of the states and, thus, great variation exists as to what constitutes a legal adoption or legal transfer of custody from state to state.⁸ In many cases, rehoming falls in a gray

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2. Megan Twohey, *Americans Use the Internet to Abandon Children Adopted from Overseas, The Child Exchange: Inside America's Underground Market for Adopted Children Part I*, REUTERS INVESTIGATES (Sep. 9, 2013), <http://www.reuters.com/investigates/adoption/#article/part1> [<http://perma.cc/B9XL-9PJC>].
 3. *Id.*
 4. *Id.*
 5. *Id.*
 6. *Id.*; see also Kathryn Huber, *Free to a Good Home: America's Unregulated Online Market for Adopted Children*, 19 PUB. INT. L. REP. 1, 3 (2013) (“[W]hen the guardian is a stranger instead of a trusted friend or relative and there is no intention of ever returning the child, the document starts to function alarmingly like a receipt.”).
 7. Twohey, *supra* note 2.
 8. *Adoption*, 50 State Statutory Surveys: Family Law: General, 0080 SURVEYS 17 (West 2007) (“There is great variety among states regarding adoption laws, perhaps due to the very personal nature of these laws.”). See also Joan Heifetz Hollinger, *ADOPTION LAW AND PRACTICE* § 1.01 (2014) (“For the most part, adoption is the product of and subject to state laws and regulations, not federal ones.”); Leslie A. Gordon, *States Start To Crack Down On Parents*

area of the law where it is unclear whether it constitutes a valid transfer of custody or whether it is illegal.⁹ Regardless, state authorities have made little effort to curb the practice of rehoming and law enforcement officials have largely failed to prosecute potential offenders.¹⁰

Overall, rehoming is an unacceptable practice and needs to be eliminated. As such, this proposal was created to reduce, and eventually eliminate, all instances of rehoming. Ultimately, this proposal has two segments: (1) reducing the rehoming of internationally adopted children through federal legislation that increases the responsibilities of adoption service providers, and (2) reducing all instances of rehoming by modifying existing federal legislation to cover instances of rehoming.

Part I will analyze the factual background behind rehoming. Part II will analyze the legal background of rehoming, focusing on an analysis of international adoption law and transfer of custody pursuant to a power of attorney document. Part III will propose solutions at the federal level in order to curb the prevalence of rehoming.

I. FACTUAL BACKGROUND OF REHOMING

Until recently, the public was (and is likely still) largely ignorant of the prevalence of rehoming. More importantly, law enforcement officials were largely unaware of the existence of rehoming.¹¹ This lack of awareness is probably the result of the relatively recent advent of

'Rehoming' Their Adopted Kids, ABA JOURNAL (Dec. 1, 2014), http://www.abajournal.com/magazine/article/states_start_to_crack_down_on_parents_re_homing_their_adopted_kids/ [<http://perma.cc/446G-CPKN>] (“The process of re-homing has been largely unregulated—no federal laws prohibit the exchange of unwanted adopted kids. Most states allow private adoptions, but the processes vary widely and oversight is limited.”).

9. See Huber, *supra* note 6, at 2 (“There are usually no background checks, no home visits, and no registration with any state or government agency.”); Twohey, *supra* note 2 (“Through Yahoo and Facebook groups, parents and others advertise the unwanted children and then pass them to strangers with little or no government scrutiny, sometimes illegally. . . . It is a largely lawless marketplace.”).
10. See Twohey, *supra* note 2 (“A child might be removed from the new home if an illegal re-homing is discovered. But seldom is either set of parents punished. No state, federal or international laws even acknowledge the existence of re-homing.”).
11. Megan Twohey, *In a Shadowy Online Network, a Pedophile Takes Home a “Fun Boy,” The Child Exchange: Inside America’s Underground Market for Adopted Children: Part II*, REUTERS INVESTIGATES (Sep. 9, 2013), <http://www.reuters.com/investigates/adoption/#article/part2> [<http://perma.cc/D6T2-N3JG>] (“Not until he was contacted for this story did Laws, an agent who specializes in protecting children, learn about the Internet groups that facilitate private re-homing.”).

rehoming.¹² In fact, “[n]o state, federal or international laws even acknowledge the existence of re-homing.”¹³

Frighteningly, the incidences of rehoming described in the Reuters’ investigative report demonstrate the ease with which custody of children can be transferred from person to person in the United States.¹⁴ The first step in the rehoming process is for the parents to seek out potential parties that might be interested in taking the child.¹⁵ In most of the incidences of rehoming, the parents “turned to online forums to advertise and facilitate the placement of their children without the benefit of safety and criminal background checks or a home study to determine the appropriateness of the placement.”¹⁶ In some instances, the parents would post the advertisement and place the child within the same day.¹⁷

Some of the instances of rehoming are transfers from adoptive parents to strangers who had previously been (or would be) declared incompetent to parent their own biological children.¹⁸ For example, Nicole Eason obtained six children through the process of rehoming.¹⁹ Prior to rehoming all six of these children, Eason had her firstborn biological child permanently taken from her by state authorities in Massachusetts for neglect.²⁰ Eason subsequently had her only other biological child permanently taken by South Carolina authorities when it was discovered that a friend’s child previously died while in Eason’s care.²¹ In fact, South Carolina welfare officials also said “[t]he home environment was deplorable for an infant, [with] trash, clothes, stale food and stagnant

12. Twohey, *supra* note 2 (reporting that “re-homing” is accomplished through the adoptive parents virtually meeting the “re-homing” parents through webpages on the Internet, which allows the inference that “re-homing” has developed with the emergence of the Internet).

13. *Id.*

14. *Id.*

15. Huber, *supra* note 6, at 2.

16. Chang, *supra* note 1.

17. See Twohey, *supra* note 11 (referring specifically to adoptive mother Glenna Mueller’s transfer of her ten-year-old son to Nicole Eason and Randy Winslow through a power of attorney document).

18. *Id.*

19. Megan Twohey, *Despite “Grave Danger,” Government Allows Internet Forums to Go Unchecked, The Child Exchange: Inside America’s Underground Market for Adopted Children: Part IV*, REUTERS INVESTIGATES (Sep. 10, 2013), <http://www.reuters.com/investigates/adoption/#article/part4> [<http://perma.cc/FP4R-H7VQ>].

20. Twohey, *supra* note 11 (“A report by Massachusetts officials, dated Jan. 3, 2000, documents the baby’s injuries. Subsequent court records show that ‘the child was removed from the parents at that time.’ Officials cited ‘neglect.’”).

21. *Id.*

water . . . The parents have an open investigation in [Massachusetts] where their parental rights are being terminated due to physical abuse on another child. Parents have severe psychiatric problems as well[,] with violent tendencies.”²² Despite this prior history, Eason was still able to obtain six children through the process of rehoming because of the lack of oversight by any regulatory, judicial, or law enforcement authority.²³ Moreover, the parents of these children were so desperate to rid themselves of their parental responsibilities that they did not obtain a background check on Eason to verify her fitness as a parent.²⁴

Eason is just one example of an individual that is clearly unfit to be a parent who has still been able to obtain children through rehoming. The Reuters article alone provides numerous other examples of individuals who are unfit to be parents, such as: (1) Randy Winslow, a self-proclaimed “lil boylover,” who is currently serving 20 years in prison for distributing child pornography;²⁵ (2) an unnamed man who sexually assaulted a Russian girl that was brought into his home through rehoming;²⁶ and (3) Debra Schmitz, a “parent” to seventeen children, who made the children dig their own graves as a form of punishment and “pleaded no contest to 14 counts of child abuse and one count of child trafficking.”²⁷

Most recently, Justin Harris, a State Representative in Arkansas, rehomed children that his family had adopted.²⁸ First, Harris placed the children in the home of Eric Francis, who is currently serving forty years in prison for raping one of the rehomed children.²⁹ Later, Harris removed the children from the Francis’s home and rehomed them again, this time with another family.³⁰

22. *Id.*

23. Twohey, *supra* note 19.

24. Twohey, *supra* note 11.

25. *Id.*

26. Megan Twohey, *Orphaned in Russia, Brought to America, and then Abandoned Time and Again, The Child Exchange: Inside America’s Underground Market for Adopted Children: Part V*, REUTERS INVESTIGATES (Sep. 11 2013), <http://www.reuters.com/investigates/adoption/#article/part5> [<http://perma.cc/BP2A-FX2C>]

27. *Id.*

28. Abby Phillip, *The Story Of An Arkansas Politician Who Gave Away His Adopted Child, And The Tragedy That Followed*, WASHINGTON POST (Mar. 13, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/03/13/the-story-of-an-arkansas-politician-who-gave-away-his-adopted-child-and-the-tragedy-that-followed/> [<http://perma.cc/7HEX-YTTF>].

29. *Id.*

30. Kevin Trager & Jessica Johnson, *Lawmaker Defends Giving Away Adopted Girls*, USA TODAY (Mar. 11, 2015, 7:47 AM), <http://www.usatoday.com/story/news/politics/2015/03/10/legislator-gives-away-adopted-girls/24733831/>

Logically, it is unsurprising that the people interested in obtaining children through rehoming would be less likely to be fit parents than those who adopt through legal means because individuals with unfit backgrounds will actively avoid any oversight when attempting to become parents. This lack of government oversight is what makes rehoming so attractive to those who are unfit to be parents, which in turn, is why the process is so adverse to the best interests of the child.³¹

II. LEGAL BACKGROUND: INTERNATIONAL ADOPTION AND REHOMING

In order to understand the legal background of rehoming, one must first understand the laws governing international adoptions in the United States. According to the United States Department of State, international adoptions are “governed by three sets of laws: U.S. federal law, the laws of the child’s country of residence, and the laws of [the] U.S. state of residence.”³² Complicating matters further, the applicable U.S. federal law changes depending on whether the child’s country of residence is a member of the *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, an international adoption treaty.³³ If the child’s country of residence is a Hague-member country, then the U.S. federal law governing adoptions from Hague-member countries applies. Conversely, if the child’s country of residence is not a Hague-member country, then the adoption laws of the U.S. state of residence take on a larger role.³⁴ For purposes of this Note, the two aspects of international adoption that have the most potential to curb the practice of rehoming are: (1) the accreditation requirements for the adoption service providers, and (2) the parental education requirement.³⁵

[<http://perma.cc/Y2KK-W5LJ>]. Harris stated that he was made aware of the child’s rape only after he had already removed the children from the Francis’s home. *Id.*

31. See Gordon, *supra* note 8 (“That’s precisely where people like the mentally ill and pedophiles go to get children. At best, it’s abandonment, and at worst, it’s human trafficking.”).

32. *How to Adopt*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, <http://travel.state.gov/content/adoptionsabroad/en/adoption-process/how-to-adopt.html> [<http://perma.cc/8RLC-DQCU>] (last updated June 28, 2013).

33. *Id.*

34. *Hague vs Non-Hague Adoption Process*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, <http://travel.state.gov/content/adoptionsabroad/en/hague-convention/hague-vs-non-hague-adoption-process.html> [<http://perma.cc/R8HT-G8DC>] (last visited May 1, 2016).

35. *Id.*

Until recently, international adoptions from non-Hague-member countries required that the adoption service provider simply be licensed in the U.S. state where the adopted child will reside.³⁶ By contrast, adoptions from Hague-member countries required that the adoption service provider be “approved by one of the Department of State’s designated Accrediting Entities” in addition to being licensed in the state of residence.³⁷ In July 2014, all international adoption service providers became subject to the same approval and accreditation procedures that Hague adoption service providers are subject to.³⁸ All organizations must be approved by the Department of State if they provide any of the main adoption services.³⁹ In order to receive approval from the Department of State, the adoption service provider must provide evidence that it is in full compliance with the Department of State’s standards as codified in the Code of Federal Regulations.⁴⁰ While these standards require that adoption service providers support parents until the adoption is finalized, the standards do not guarantee parents any post-

36. *Id.*

37. *Id.* There is a distinction between accredited adoption service providers and approved adoption service providers. *See Hague Adoption Process*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE <http://travel.state.gov/content/adoptionsabroad/en/adoption-process/how-to-adopt/hague-adoption-process.html> [<http://perma.cc/XN2W-AP9F>] (last updated Oct. 22, 2013) (“Accredited ASPs are non-profit organizations [agencies] while approved ASPs are individuals [such as attorneys] or for-profit organizations.”). For purposes of this Note, the distinction is irrelevant. Thus, the term “approved” will be used in reference to all adoption service providers.

38. 42 U.S.C. § 14925 (2012) (“The provisions of title II of this chapter and section 404 of the Intercountry Adoption Act of 2000 . . . and related implementing regulations, shall apply to any person offering or providing adoption services . . . to the same extent as they apply to the offering or provision of adoption services in connection with a Convention adoption.”).

39. 22 C.F.R. § 96.2 (2015) (“*Adoption service* means any one of the following six services: (1) Identifying a child for adoption and arranging an adoption; (2) Securing the necessary consent to termination of parental rights and to adoption; (3) Performing a background study on a child or a home study on prospective adoptive parent(s), and reporting on such a study; (4) Making non-judicial determinations of the best interests of a child and the appropriateness of an adoptive placement for the child; (5) Monitoring a case after a child has been placed with prospective adoptive parents until final adoption; and (6) When necessary because of a disruption before final adoption, assuming custody of a child and providing or facilitating the provision of childcare or any other social service pending an alternative placement.”).

40. 22 C.F.R. § 96 (2015).

adoption support or follow-up.⁴¹ Altering the approval standards for adoption providers may reduce the prevalence of rehomings.⁴²

Another important factor that may impact the prevalence of rehomings is the parental education requirements of non-Hague, Hague, and domestic adoptions.⁴³ In non-Hague adoptions, parental education is not required unless the child's birth country or the state of residence has adopted its own parental education requirement.⁴⁴ Adoptions from Hague-member countries require that parents receive at least ten hours of Hague-approved education prior to becoming eligible to adopt.⁴⁵ While ten hours of required parental education is an improvement from non-Hague adoptions, it is still less than the "U.S. state foster-care systems, [in which] more training is required: typically 30 hours."⁴⁶ Usually, many of the parental education courses provide information that can be tailored to the individual circumstances of the adoption (whether it is the adoption of an older child, an interracial adoption, geographical or cultural issues that could affect the child's transition into the family, etc.).⁴⁷ In general, these courses are aimed at educating parents about

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41. 22 C.F.R. § 96.51(b) (2015) ("The agency or person informs the prospective adoptive parent(s) in the adoption services contract whether the agency or person will or will not provide any post-adoption services. The agency or person also informs the prospective adoptive parent(s) in the adoption services contract whether it will provide services if an adoption is dissolved, and, if it indicates it will, it provides a plan describing the agency's or person's responsibilities.").
 42. See *infra* Part III (proposing promulgating regulations for adoption service providers to require parental education and post adoption services).
 43. Gordon, *supra* note 8 ("Both domestically and internationally there's woefully slim pre-adoption training and post-adoption support. As a result, some kids may end up destroying property, becoming violent and resisting nurturing by their new parents.").
 44. BUREAU OF CONSULAR AFFAIRS, *supra* note 34.
 45. *Id.*
 46. Twohey, *supra* note 11 (explaining that the amount of parental training required in the U.S. foster system is dependent on the requirements of each state).
 47. 22 C.F.R. § 96.48(b) (2015) ("The training provided by the agency or person addresses the following topics: (1) the intercountry adoption process, the general characteristics and needs of children awaiting adoption, and the in-country conditions that affect children in the foreign country from which the prospective adoptive parent(s) plan to adopt; (2) the effects on children of malnutrition, relevant environmental toxins, maternal substance abuse, and of any other known genetic, health, emotional, and developmental risk factors associated with children from the expected country of origin; (3) information about the impact on a child of leaving familiar ties and surroundings, as appropriate to the expected age of the child; (4) data on institutionalized children and the impact of institutionalization on children, including the effect on children of the length of time spent in an institution and of the type of care provided in the expected country of origin; (5) information on attachment disorders and other emotional problems that institutionalized or traumatized

the short-term adoption process and the long-term implications of their adoption decision.⁴⁸

Once the adoption has been finalized in a U.S. court, the adoptive child is placed in the same legal position as that of a birth child.⁴⁹ After the adoption is legally recognized, the parents have the same parental rights as they would over any other child.⁵⁰ Thus, if the parents are dissatisfied with the adoption, a power of attorney document could be used to rehome the child. In all of the rehoming scenarios described by the investigative reports, a power of attorney document was used in the transfer of these children to the new home.⁵¹

Traditionally, transfer of temporary custody through a power of attorney document has been a useful “option for parents experiencing a crisis; the process involves designating a trusted person to care for the children without involving welfare authorities.”⁵² However, in the context of rehoming, a power of attorney document allows the “parents [to] delegate[] to strangers the authority to make education and health decisions on behalf of their child.”⁵³ And each individual state has its own laws on guardianship and power of attorney.⁵⁴ Thus, the extent of the powers granted to the new “parents” and the duration granted by the

children and children with a history of multiple caregivers may experience, before and after their adoption; (6) information on the laws and adoption processes of the expected country of origin, including foreseeable delays and impediments to finalization of an adoption; (7) information on the long-term implications for a family that has become multicultural through intercountry adoption; and (8) an explanation of any reporting requirements associated with intercountry adoptions, including any post-placement or post-adoption reports required by the expected country of origin.”); *see also General Adoption, HAGUE TRAINING ONLINE COURSES*, <http://www.haguetrainingonline.org/course-detail.php?regionid=6> [<http://perma.cc/S2ZV-UGM3>] (last visited May 1, 2016) (describing various online training classes for international adoptions).

48. HAGUE TRAINING ONLINE COURSES, *supra* note 47.

49. *What is Intercountry Adoption*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, <http://travel.state.gov/content/adoptionsabroad/en/adoption-process/what-is-intercountry-adoption.html> [<http://perma.cc/Y5V6-NKZ5>] (last updated June 4, 2013) (“Generally speaking, to qualify as an adoption for immigration purposes into the United States, the adopted child must have the same status and relationship to the adoptive parents as a child by birth.”).

50. *Id.*

51. Twohey, *supra* note 11; Dan Rather, *Unwanted in America: The Shameful Side of International Adoption*, VIMEO, (Dec. 2, 2014), <https://vimeo.com/117858028> [<http://perma.cc/H7F3-EAFB>].

52. Huber, *supra* note 6, at 2.

53. Chang, *supra* note 1.

54. *Adoption*, 50 State Statutory Surveys, *supra* note 8.

power of attorney document varies from state to state.⁵⁵ Some states even require that a court approve the power of attorney document if the child is to remain with the new family for a specified time period.⁵⁶ But it is relatively easy for the parents to fail to have a court approve transfer of guardianship via a power of attorney document because no regulatory body tracks the use of such documents and there are limited penalties for their failure.⁵⁷

As such, it is difficult to determine the prevalence with which these state statutes are violated because the “states set the rules for domestic adoption and recognition of adoptions finalized in other countries, including [the] criteria for the termination of parental rights and how advertising of an adoption may occur.”⁵⁸ The variations in state law make it difficult to maintain accurate nationwide data on the prevalence of rehoming through a power of attorney document.⁵⁹ Moreover, no federal agency tracks the number of international adoptions that have been disrupted after the adoption has been finalized in a U.S. court.⁶⁰ In fact, neither the adoption service provider nor any government agency is required to check up on the adoption after it has been made final by a U.S. court.⁶¹ Thus, adoptive parents and the new

55. *See id.* (reviewing differences in state adoption standards and providing links to various state adoption statutes).

56. *See* WIS. STAT. ANN. § 48.979 (West 2011).

57. *See* Twohey, *supra* note 11 (“In many cases, [using a power of attorney] is a gray zone: The transfer takes place out of the view of the child-welfare and court systems. The document isn’t officially recorded anywhere.”). *See also* EVAN B. DONALDSON ADOPTION INST., *supra* note 1, at 3 (“The act of unregulated custody transfer [via a power of attorney] does not fall outside the scope of the child welfare purview, rather, the reporting and intervening in such cases is the true challenge, because these practices intentionally circumvent state child welfare agencies and courts.”).

58. Chang, *supra* note 1.

59. *Id.* (“The prevalence of re-homing and adoption disruption/dissolutions is difficult to measure precisely as there are limited formal means by which this information is reported.”).

60. Andrea B. Carroll, *Breaking Forever Families*, 76 OHIO ST. L.J. 259, 261 (2015) (“It is difficult to quantify precise rates of adoption disruption today, largely because no records are kept by any entity, governmental or private.”). *See also* FY 2013 ANNUAL REPORT ON INTERCOUNTRY ADOPTION, U.S. DEP’T OF STATE BUREAU OF CONSULAR AFFAIRS (2014) (enumerating five instances of disrupted international adoption prior to the adoption being finalized in U.S. court but not containing a metric for disrupted adoptions after the adoption had been finalized).

61. *Intercountry Adoption from A to Z*, U.S. DEP’T OF STATE, OFFICE OF CHILDREN’S ISSUES, http://travel.state.gov/content/dam/aa/pdfs/Intercountry_Adoption_From_A_Z.pdf [<http://perma.cc/CH6X-R3L3>] (last visited May 2, 2016) (explaining that in certain circumstances, the adoption service provider will be required to send periodic reports on the child to the child’s

parents use the power of attorney document to avoid scrutiny by government regulatory agencies, which increases the difficulty of gathering data on the prevalence of rehomings.⁶² For example, adoptive parent Glenna Mueller transferred the custody of her ten-year-old son via a power of attorney document so that “the state would [not] know and therefore wouldn’t investigate her for neglect or abuse.”⁶³ The underlying reason for Mueller’s use of a power of attorney—to avoid government oversight—is the same reason that a transfer of custody through a power of attorney is so adverse to the best interests of the child.

A. Rehoming and International Adoptions

Due to the recent discovery of the rehomings phenomenon, there are relatively few statistics on the prevalence of rehomings. But the Reuters’ investigation estimated that internationally adopted children consist of approximately seventy percent of the children offered for rehomings on a Yahoo bulletin board.⁶⁴ Importantly, many of the children discussed in the investigative reports were from non-Hague-member countries, which do not require parental education prior to adoption.⁶⁵ Additionally, many of these children were adopted postinfancy, which means that the adoption is at a higher risk of failure.⁶⁶ In fact, a study performed by the Evan B. Donaldson Adoption Institute stated that “internationally adopted youth manifest more emotional and behavioral problems” than those that are adopted out of the domestic foster care system, which may explain the higher prevalence of rehoming of internationally adopted children.⁶⁷ Frequently, these emotional and behavioral problems “result from neglect or mistreatment by birth parents or at overloaded orphanages.”⁶⁸

home country until the child has turned eighteen years old. However, the report is completed without in-person contact with the child. Thus, parents who have rehomed their adoptive child can simply lie to the agency and the agency would have great difficulty realizing that the parents were lying).

62. Twohey, *supra* note 11.

63. *Id.*

64. Twohey, *supra* note 2; MARK GREENBERG & JOO YEUN CHANG, RE-HOMING OF ADOPTED CHILDREN: RESPONSIBILITIES FOR STATES AND OPPORTUNITIES IN THE PROVISION OF POST-ADOPTION SERVICES (2014).

65. Dan Rather, *supra* note 51. These non-Hague adoptions were: Liberia, Russia, Ethiopia, Ukraine, and Haiti. *Id.* See also Twohey, *supra* note 11 (noting that there is no education requirement for non-Hague countries).

66. EVAN B. DONALDSON ADOPTION INST., KEEPING THE PROMISE: THE CRITICAL NEED FOR POST-ADOPTION SERVICES TO ENABLE CHILDREN AND FAMILIES TO SUCCEED 17 (2010).

67. *Id.* at 14.

68. Gordon, *supra* note 8.

Another factor that may contribute to the prevalence of international adoptees being rehomed at a higher rate is that international adoptive parents are required to undergo fewer educational classes, if any at all, when compared with U.S. adoptive parents, who, many times, are required to undergo extensive parental education prior to adopting.⁶⁹ As previously discussed, these courses are aimed at informing parents of the potential issues that they will face as adoptive parents. Many of these courses contain valuable information that many adoptive parents may not have considered previously. For example, the course entitled “Health and Development of Orphaned Children” is intended to “educate families about the effects on children of malnutrition, relevant environmental toxins, maternal substance abuse and of any other known genetic, health, emotional and developmental risk factors associated with orphaned children.”⁷⁰ Often, adoptive parents who intend to adopt noninfant orphans from a non-Hague-member country do not realize that their adoption is at a higher risk of disruption because they have not been required to undergo adequate parental education or screening.⁷¹ Thus, the parents may not be aware of the specific challenges present in an international adoption and may be ill prepared to parent an internationally adopted child, which could then lead to attempts to informally eliminate their parental responsibilities by rehoming the child.

Similarly, adoptive parents are often provided with inconsistent and, sometimes, wildly inaccurate information regarding the physical, psychological, and mental ailments of the adoptive child.⁷² For example, one set of adoptive parents turned to rehoming after adopting a child

69. See BUREAU OF CONSULAR AFFAIRS, *supra* note 34 (showing less education requirements for countries that do not follow the Hague convention adoption process). See also Twohey, *supra* note 11 (“As a member [of the Hague Adoption Convention], the United States requires parents to take 10 hours of training before adopting from another member country, such as China. [There is no requirement when adopting from a non-Hague country, such as Ethiopia.] When Americans adopt children from U.S. state foster-care systems, more training is required: typically 30 hours.”).

70. HAGUE TRAINING ONLINE COURSES, *supra* note 47.

71. See Gordon, *supra* note 8 (“Both domestically and internationally there’s woefully slim pre-adoption training and post-adoption support. As a result, some kids may end up destroying property, becoming violent and resisting nurturing by their new parents.”).

72. *Id.* (“[R]e-homing signals ‘a much more basic, systemic problem’—the lack of resources to properly screen prospective parents and to inform both the child and the family of what to expect from adoption. ‘Adoptive parents need to have a real-life reality check and then real good support once those children arrive.’”). See also Huber, *supra* note 6, at 4 (“[A]doption agencies can help . . . [by] full disclosure of any and all relevant factors that may affect the child in his or her new home.”) (referring to an interview with Bruce Boyer, Dir. of Civitas Child Law Inst., Loyola Univ. Chi. Sch. of Law (Nov. 13, 2013)).

that (1) was four years older than what was disclosed and (2) had many undisclosed preexisting behavioral issues.⁷³ These same parents stated that “[a]doption agencies . . . face no repercussions for failing to disclose pre-existing problems of the children they place.”⁷⁴ Many times, these inaccuracies do not become apparent until the child has been placed with the family.⁷⁵ Thus, the preparations that the adoptive parents made may not be adequate, or the adoptive family may not have the requisite resources to provide for the child’s undisclosed conditions. As such, some parents may become overwhelmed and turn to rehoming.

Additionally, only twenty states “allow[] internationally adopted children to participate in their post-adoption programs” according to the U.S. Department of Health and Human Services.⁷⁶ Moreover, many adoption service providers do not offer any support after the adoption has been finalized because they are not required to.⁷⁷ As such, parents of internationally adopted children are without the same resources, such as behavioral counseling, that may be available to parents who adopt domestically. Recent research has shown that at least a majority of all adopted children will require specialized counseling to aid with mental health needs postadoption, which makes international adoptions particularly susceptible to rehoming because of the lack of publicly funded postadoption services.⁷⁸

Lastly, international adoptees are more likely to be rehomed because there is little to no postadoption oversight over the child as compared with domestic adoptions.⁷⁹ This lack of oversight allows adoptive

73. Twohey, *supra* note 26.

74. *Id.*

75. See Phillip, *supra* note 28 (describing Arkansas State Representative Justin Harris’s situation where he adopted, and subsequently rehomed, two children. Harris claims that he was unaware of their preexisting emotional and behavioral issues until after the adoption was finalized).

76. GREENBERG & CHANG, *supra* note 64 (“45% of the 45 states that participated in the survey reported that they allowed internationally adopted children to participate in their post-adoption programs.”); see also EVAN B. DONALDSON ADOPTION INST., *supra* note 1, at 5 (“a nationwide review of publicly funded post-adoption services found that only 17 states had a substantial array of services.”).

77. 22 C.F.R. § 96.51 (2015). See also Twohey, *supra* note 11 (“Some agencies provide post-adoption support to families, but they aren’t required to, and many don’t.”).

78. EVAN B. DONALDSON ADOPTION INST., *supra* note 1, at 5; see also Twohey, *supra* note 2 (stating that international adoptees account for seventy percent of rehomed children).

79. See Twohey, *supra* note 11 (“Some international adoptions are approved in a foreign court; others in a local U.S. court. In foreign court adoptions, no authority checks on the child in the new home. In U.S.-court cases, the family may face monitoring by a social worker for around six months.”).

parents to transfer custody of their international adoptees through a power of attorney document with almost no risk of intervention by a government agency.⁸⁰ While some foreign countries attempt to retain some form of oversight over the adopted child, these measures will not be a deterrent to adoptive parents who seek to rehome their adoptive child because there is minimal potential for recourse, if any, against the adoptive parents.⁸¹

Given these issues, coupled with the lack of postadoption resources offered by the states and the adoption services provider, adoptive parents of internationally adopted children are more likely to turn to rehoming as an alternative.⁸²

But why turn to rehoming as opposed to other alternatives? International adoptive parents typically have three options when attempting to remove the child from their home: (1) “formal re-adoption”; (2) “transfer of guardianship in court”; and (3) less formal transfer of custody without court involvement.⁸³

In a formal readoption, a court must approve the termination of the adopted parents’ parental rights and find that transferring the parental rights to the new parents would be in the best interest of the child.⁸⁴ In order to make this finding, the new parents would be required to undergo a home study, comply with any applicable state laws regarding adoption requirements, and pass a background check.⁸⁵ In a court-authorized transfer of guardianship, a court reviews the transfer to determine what is in the best interest of the child.⁸⁶ However, the parental rights of the original parents would not be terminated.⁸⁷ In formal re-adoption and a court-authorized transfer of guardianship, the parents would be financially responsible for associated costs. Lastly, the less formal transfer of custody provides the least protection to the child’s

80. *Id.*

81. *Id.* (“Some countries require periodic reports on the child’s well-being in their new homeland. Violators face little risk. A foreign country can cut off the agency involved, but has no recourse against the adoptive parents.”).

82. *See* Twohey, *supra* note 2. (explaining that seventy percent of “rehoming” incidences were of international adoptees).

83. Twohey, *supra* note 11.

84. *Id.* (“This requires court approval—and affords the most protection for the child. The original adoptive family must terminate parental rights. The new family submits to a criminal background check and additional vetting by a social worker.”).

85. *Id.*

86. *Id.* (“The original adoptive parents don’t terminate parental rights. The new guardians may have to undergo a background check.”).

87. *Id.*

best interests, costs nothing, and occurs without court approval—rehoming falls within this category.⁸⁸

In rare occasions, adoptive parents “try to relinquish a child to a state’s child-welfare system.”⁸⁹ This is typically a last resort for parents because “[i]n many states, these parents must be investigated for abuse and neglect. If the state takes the child, often parents must pay for the child’s care until he or she is re-adopted.”⁹⁰ Also, relinquishment of the adopted children could result in abandonment charges, which can greatly deter parents that also have biological children.⁹¹ If a state finds the adoptive parents guilty of abandonment, the state may take away the biological children.⁹² For example, Rep. Justin Harris has stated that he turned to rehoming only after the Arkansas Department of Health Services informed him that his biological children may be taken from him if he relinquished his adopted children to the state, thereby constituting abandonment.⁹³ Thus, the quickest, least risky, and most cost-efficient option for adoptive parents is a transfer of custody without court involvement. Unfortunately, this is also the option that provides the least amount of protection to the adopted child because there is no oversight by a child-welfare agency or court.⁹⁴

B. The Legality of Rehoming

As previously mentioned, the individual states are responsible for creating the rules related to transfers of custody, power of attorney documents, adoptions, and termination of parental rights.⁹⁵ Thus,

88. *Id.* (“The original adoptive family signs a piece of paper granting the new family power of attorney over the child for a period of time. Once notarized, this document allows the new family to enroll the child in school and secure government benefits for the child. In many cases, this is a gray zone: The transfer takes place out of the view of the child-welfare and court systems. The document isn’t officially recorded anywhere. This is a preferred method for families seeking a temporary, out-of-home placement for the child . . .”).

89. *Id.*

90. *Id.*

91. See Phillip, *supra* note 28 (referring to Harris’s explanation that the Arkansas Department of Health Services (DHS) threatened to charge him with abandonment if he were to relinquish his adopted children to the state).

92. *Id.*

93. *Id.* (“‘At this point, we again reached out to DHS for help, and then we were threatened with possible abandonment charges and potentially losing our own boys,’ Harris said.”).

94. Twohey, *supra* note 11.

95. See *Adoption*, 50 State Statutory Surveys, *supra* note 8 (surveying adoption rules in all fifty states); Chang, *supra* note 1 (“[States] establish rules related to guardianship and power of attorney. In addition, states set rules for domestic adoption and recognition of adoptions finalized in other countries, including

rehoming may be clearly legal or illegal depending on what state law governs the transfer of custody via a power of attorney document.⁹⁶ It is more likely, however, that rehoming falls within a “gray zone,” where its legality is unclear.⁹⁷ In fact, one commentator familiar with rehoming has stated that “[s]hockingly, rehoming isn’t illegal everywhere—and perhaps anywhere.”⁹⁸

Yet rehoming may be illegal when the parents transfer custody through a power of attorney to new “parents” that live in a different state. Some commentators suggest that these transfers violate the Interstate Compact on the Placement of Children (ICPC).⁹⁹ The ICPC is an agreement among all fifty states, the District of Columbia and the US Virgin Islands¹⁰⁰ that governs the interstate placement of children.¹⁰¹ The ICPC requires that authorities in the sending and receiving states be notified when custody of a child is transferred across state lines.¹⁰² Unfortunately, state prosecutors and law enforcement officials are largely unaware of the existence of the ICPC.¹⁰³ When the state officials are aware of

criteria for the termination of parental rights and how advertising of an adoption may occur.”).

96. Gordon, *supra* note 8 (“The process of re-homing has been largely unregulated—no federal laws prohibit the exchange of unwanted adopted kids. Most states allow private adoptions, but the processes vary widely and oversight is limited.”).
97. See Destinee Roman, *Please Confirm Your Online Order: One Child Adopted From Overseas At No Cost*, 52 HOUS. L. REV. 1007, 1015–18 (2015) (concluding that rehoming may or may not constitute human trafficking). See also Twohey, *supra* note 11 (“In many cases, this is a gray zone . . .”). See generally Micah Schwartzbach, “Rehoming” Law: Are Private Child-Custody Transfers Illegal?, UNCUFFED (April 17, 2014), <http://uncuffedcrime.blogspot.com/2014/04/rehoming-law-are-private-child-custody.html> [<http://perma.cc/X8MR-SG7Y>] (explaining that rehoming might be legal everywhere).
98. Schwartzbach, *supra* note 97.
99. Twohey, *supra* note 2 (“Such agreements fail to satisfy the ICPC when custody of the child is exchanged across state lines and authorities in both states aren’t involved.”).
100. Kurtis A. Kemper, Annotation, *Construction and Application of Interstate Compact on the Placement of Children*, 5 A.L.R.6th 193, 208 (2005).
101. *Id.*
102. NAT’L CTR. FOR INTERSTATE COMPACTS (NCIC), INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN [hereinafter ICPC], <http://www.csg.org/knowledgecenter/docs/ncic/InterstateCompactonthePlacementofChildren-OriginalCompact-circa1960.pdf> [<http://perma.cc/CU4R-U3CB>]. See also Twohey, *supra* note 11 (“If authorities aren’t informed, the adults involved in the transfer have violated state laws in both states.”).
103. Twohey, *supra* note 19 (“State Police investigator Northup says he was unaware of the law governing interstate child transfers until being contacted for this article.”); see also Megan Twohey, *U.S. Lawmakers Call for Action to Curb Internet Child Trading*, REUTERS (Oct. 29, 2013, 5:37 PM), <http://www.reuters.com/article/2013/10/29/us-adoption-react-idUSBRE99S1A>

the ICPC, “it is currently not well understood, weakly enforced, and only carries minimal penalties for violation”¹⁰⁴—if penalties even exist at all.¹⁰⁵

Moreover, the penalties are adopted by each individual state, so there is great variation regarding whether a violation can be punished.¹⁰⁶ Some of the penalties consist of the following: (1) “refusal to permit adoption”; (2) “termination of placement with prospective adoptive parents”; (3) “[r]etroactive compliance with the ICPC”; and (4) “monetary penalty against the parties.”¹⁰⁷ Commentators suggest that these penalties do little to curb the practice of rehoming.¹⁰⁸ Given the difficulty that state law enforcement officials have in discovering that custody has been transferred over state lines via a power of attorney document,¹⁰⁹ the general unawareness of state law enforcement authorities regarding the ICPC requirements,¹¹⁰ and the insufficient penalties associated with the ICPC,¹¹¹ the ICPC has had little impact on deterring the practice of rehoming. Because of the wide variation in the penalties and enforcement of the ICPC between states, the ICPC is not the best tool to address rehoming. Instead, Congress should modify existing federal legislation to curb the prevalence of rehoming.

In his testimony before the Subcommittee on Children and Families, Joo Yeun Chang, the Associate Commissioner of the Children’s Bureau, stated that “[t]he practice of re-homing is unacceptable, is

320131029 [http://perma.cc/2AUF-YSMG] (“[A]n agreement among states is supposed to prohibit parents from transferring custody of a child to a non-relative across state lines without approval of officials in both states. But the agreement is rarely enforced.”).

104. Huber, *supra* note 6, at 4.

105. Twohey, *supra* note 19.

106. Twohey, *supra* note 11 (“How—or even whether—authorities enforce the [ICPC] differs by state. In some states, violations are considered crimes, typically misdemeanors. But other states aren’t explicit about how violators of the ICPC should be punished.”). *See also* ICPC, *supra* note 102 (explaining that violations may be punished in either state).

107. Kemper, *supra* note 100, at 258–272.

108. *See* Huber, *supra* note 6, at 4 (advocating for increased penalties for illegal child custody transfers).

109. *See* Twohey, *supra* note 2 (exhibiting the ease with which people transfer children across state lines undocumented).

110. *See* Twohey, *supra* note 11 (referring specifically to Kevin Laws, the federal law enforcement agent, who was unaware of the existence of rehoming until the Reuters’ reporter contacted him regarding the investigative report).

111. Kemper, *supra* note 100. *See also* Huber, *supra* note 6, at 1–3 (describing the how combination of weak legal protections and enforcement, failure to track the outcomes of international adoptions, and the ease of internet communications contribute to the prevalence of rehoming).

clearly an act of abuse and neglect, and should receive the full attention of child welfare agencies.”¹¹² He testified that the practice of rehoming might be curbed through adaption of the federal Child Abuse Prevention and Treatment Act (CAPTA).¹¹³ Under CAPTA, states must have procedures to respond to all reports of child abuse or neglect.¹¹⁴ CAPTA leaves the states to codify their own definitions of child abuse and neglect.¹¹⁵ As such, the legality or illegality of rehoming currently depends on each state’s definition of child abuse.¹¹⁶

Currently, CAPTA provides federal funds to States “for [the] purposes of assisting the States in improving the child protective services system of each such State.”¹¹⁷ In order to receive funds under CAPTA, states must have “a State law for mandatory reporting by individuals required to report” suspected instances of child abuse or neglect.¹¹⁸ Many state statutes require mandatory reporting by a broad range of professionals, including health care workers and school teachers,¹¹⁹ if the professional has “reasonable cause to suspect”¹²⁰ child abuse or neglect. Thus, in many states, the knowledge threshold for a professional to have a mandatory duty to report is relatively low—the professional

112. Chang, *supra* note 1.

113. *Id.*; Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101–5116 (2012).

114. 42 U.S.C. § 5106a(b)(2)(B)(ii)(II) (2012).

115. 42 U.S.C. § 5106a(a) (2012).

116. *See, e.g.*, Trager & Johnson, *supra* note 30 (“Though the rehoming of adopted children without the intervention of state authorities is legal in Arkansas, Louisiana and Wisconsin made those actions a crime through legislation enacted last year, and the practice also received attention from lawmakers in Colorado, Florida and Ohio, according to the National Council of State Legislatures.”). *See also* Ctr. for Adoption Policy, *Synopsis of State Laws Regarding the Practice of Private Re-Homing* (Sept. 18, 2014), <http://www.adoptionpolicy.org/pdf/10-4-14%20Center%20for%20Adoption%20Policy%20Rehoming%20Research%20Synopsis%20State.pdf> [<http://perma.cc/7FQ4-98MW>] (describing how state legislation can be used to stop rehoming).

117. 42 U.S.C. § 5106a(a).

118. 42 U.S.C. § 5106a(b)(2)(B)(i) (2012). This is only one of the requirements to receive federal funds. For the other requirements, see 42 U.S.C. § 5106a(b)(2) (2012).

119. *See, e.g.*, OHIO REV. CODE ANN. § 2151.421(A)(1)(b) (West 2015) (mandating people acting in official and professional capacities to report child abuse); WIS. STAT. ANN. § 48.981(2) (West 2015) (listing people mandated to report child abuse).

120. OHIO REV. CODE ANN. § 2151.421(A)(1)(a) (West 2015). *See also* WIS. STAT. ANN. § 48.981(1) (West 2015).

must only have a *reasonable suspicion*, rather than *actual knowledge*, of child abuse or neglect.¹²¹

CAPTA also established a “national clearinghouse” to collect information from the states on child abuse and neglect.¹²² This national clearinghouse has multiple functions.¹²³ With regard to rehoming, however, the two most important functions are: (1) to “maintain and disseminate information relating to the incidence of child abuse and neglect,”¹²⁴ and (2) to provide training resources “to individuals who are engaged . . . in the prevention, identification, and treatment of child abuse and neglect,” including personnel in the fields of law enforcement, health, and education.¹²⁵

To date, neither the ICPC nor CAPTA has deterred parents from rehoming children. Unfortunately, from a federal standpoint, rehoming is not clearly an illegal practice. If it is illegal from a federal standpoint, the law currently lacks the necessary enforcement mechanisms to reduce or eliminate the rehoming of adopted children.¹²⁶

III. PROPOSAL TO REDUCE AND ELIMINATE REHOMING

Some commentators argue that Congress should pass punitive legislation at the federal level to codify rehoming as a crime.¹²⁷ At first glance, criminalizing rehoming is an obvious and necessary solution. Criminalization would penalize blameworthy parents who rehome their child to protect their own self-interest over their child’s best interests. And, naturally, criminalization would deter parents from rehoming their adoptive children. But the deterrent effect inherent in criminalization may also force parents to keep an unwanted adoptive child, which is adverse to the child’s best interests. And, in some circumstances, keeping an adoptive child in the adoptive home results in even worse outcomes than rehoming, such as the child’s death.¹²⁸ So criminalization, without addressing the underlying issues that cause adoptions to fail, will only force adoptive parents to keep an unwanted child and helps neither the adoptive child nor their adoptive parents.

121. OHIO REV. CODE ANN. § 2151.421(A)(1)(a) (West 2015). *See also* WIS. STAT. ANN. § 48.981(1) (West 2015).

122. 42 U.S.C. § 5104 (2012).

123. 42 U.S.C. § 5104(b) (2012).

124. 42 U.S.C. § 5104(b)(5)(A) (2012).

125. 42 U.S.C. § 5104(b)(7) (2012).

126. Specifically referring to the ICPC, *supra* note 102.

127. *See, e.g.*, Roman, *supra* note 97, at 1034 (“Federal lawmakers must enact a law directly and explicitly criminalizing private rehoming . . .”).

128. *See* Carrol, *supra* note 60, at 266 (describing the deaths of adoptive children Nina Hilt and Hana Williams at the hands of their adoptive parents).

So, instead of legislation that solely criminalizes rehoming, Congress should enact proactive federal legislation that addresses the underlying causes of rehoming, such as the lack of adequate parental education requirements, the absence of accountability of adoption service providers, and the deficiency in postadoption services. The interests of adoptive children will be best protected if Congress focuses on a solution that addresses the causes of rehoming because it will prevent adoptive parents from becoming desperate enough to turn to rehoming. Thus, this Note argues for a preventative approach to rehoming, rather than an exclusively punitive approach.

As internationally adopted children currently account for seventy percent of the occurrences of rehoming,¹²⁹ federal legislation should be adopted to specifically address rehoming in the international adoption context. Additionally, Congress should modify CAPTA to make rehoming illegal and to provide additional safeguards that extend to all cases of rehoming, not simply to international adoptees.

A. Federal Legislation for International Adoptions

The proposals in this section are intended to reduce the prevalence with which internationally adopted children are rehomed through a series modifications to existing federal statutes at the preadoption and postadoption stages. Essentially, these proposals expand the pre- and postadoption services delivered by adoption service providers. These proposals are proactive because they are intended to dissuade parents from considering rehoming. Specifically, federal legislation should be enacted to require: (1) adoption service providers to ensure that parents receive thirty hours of parental education prior to adoption; (2) adoption service providers to provide readoption services at no cost to the parents in certain circumstances; and (3) adoption service providers to periodically check the status of the child and aid in finding counseling after the adoption has been finalized.

As a threshold matter, however, it must be determined whether Congress has the authority to enact this type of legislation at the federal level. Adoption law is generally an area reserved for the states.¹³⁰ Thus, each state can enact its own laws on adoption.¹³¹ Yet, international adoption involves issues of immigration and citizenship, which invoke

129. GREENBERG & CHANG, *supra* note 64, at 2.

130. Hollinger, *supra* note 8, § 1.01 (“For the most part, adoption is the product of and subject to state laws and regulations, not federal ones.”).

131. *Id.* (“Pursuant to the Ninth and Tenth Amendments to the U.S. Constitution, state governments are considered the proper domain for the enactment of family, property and succession laws.”).

the powers granted to Congress in Article I, Section 8 of the Constitution.¹³² In *Fiallo v. Bell*,¹³³ the Supreme Court interpreted the extent of Congress's powers in the immigration context and stated that "[n]othing . . . suggests that Congress has anything but exceptionally broad power to determine which classes of aliens may lawfully enter the country."¹³⁴ Additionally, the Court has "repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."¹³⁵ Because these proposals affect immigration and citizenship,¹³⁶ and because Congress has "plenary power to set the conditions for entry into the country, the circumstances under which a person can remain, and the rules for becoming a citizen,"¹³⁷ this Note argues that Congress has the authority under Article I, Section 8 of the Constitution to enact the following proposals.

1. Preadoption: Mandated Parental Education

As stated in Section II.A, the accounts in the investigative reports suggest that children adopted from non-Hague-member countries are more likely to be rehomed. As non-Hague-member countries do not require parental education, the increased instances of rehoming of non-Hague children could be caused by a lack of realistic expectations on the parents' behalf.¹³⁸

In order to better prepare parents' expectations for the international adoption, federal legislation should be enacted to require all international adoption service providers to provide adoptive parents with mandatory parental education as a predicate to eligibility to be matched with a child. Currently, adoption service providers are only required

132. U.S. CONST. art. I, § 8, cl. 4 ("To establish an uniform Rule of Naturalization").

133. 430 U.S. 787 (1977).

134. *Id.* at 794.

135. *Id.* at 792 (citing *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)). See also ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.5 (4th ed. 2011).

136. See *supra* Part II (outlining the legal background of international adoption and rehoming). See also *infra* Part III.A.1–3 (advocating for the extension of parental education requirements to international adoptions and reviewing inadequacies of pre and post-adoption services).

137. CHERMERINSKY, *supra* note 135, at § 3.5.

138. See *supra* Part II.A (describing the process of international adoptions and rehoming). See also Twohey, *supra* note 2 (describing the process of international adoptions and rehoming, including the lack of documentation rehoming can happen with); Gordon, *supra* note 8 (claiming that "the lack of resources to properly screen prospective parents and to inform both the child and the family of what to expect from adoption" are systemic reasons why parents turn to rehoming).

to provide prospective adoptive parents with training, if the adoption is from a Hague-member country.¹³⁹ Thus, this proposal would simply extend the existing education requirement that is already in place for adoptions from Hague member countries to non-Hague-member countries. Further, given the increased risk of emotional and behavioral problems in international adoptees,¹⁴⁰ the education requirement for all international adoptions (Hague and non-Hague-member country adoptions) should be increased to thirty hours. This increase will ensure that adoptive parents are more educated about the short- and long-term risks associated with international adoption and that they are informed of the resources available to the family once the adoption has been finalized. Thus, Congress should modify the existing parental education requirement to: (1) extend to all international adoptions, and (2) increase the amount of parental education to a minimum of thirty hours.

Critics of this proposal may argue that it will have a deterrent effect on international adoptions because it will create an additional barrier to adoption, which would be adverse to the best interests of the child.¹⁴¹ The critics would likely contend that being placed in a home—with parents—in a country like the United States, would be better for an individual child than remaining in the orphanage in his or her home country.¹⁴² But this argument assumes that being placed in an approved home in the United States is always better for the child than remaining in the orphanage. Sadly, the reports of rehoming undermine this assumption—as the Reuters report has demonstrated, a home in the United States is not always in the best interest of the child. Other commentators have argued that increased education requirements would have little practical effect on preparing adoptive parents for the challenges that their families may face.¹⁴³ But many times, the adoptive parents are not aware of the risk that the preadoption reports regarding the

139. 42 U.S.C. § 14923(b)(1)(A)(iii) (2012) (“The agency provides prospective adoptive parents with a training program that includes counseling and guidance for the purpose of promoting a successful intercountry adoption . . .”).

140. EVAN B. DONALDSON ADOPTION INST., *supra* note 66, at 14.

141. *See generally* Elizabeth Bartholet, *International Adoption: The Child's Story*, 24 GA. ST. U. L. REV. 333 (2007) (arguing that barriers to international adoption are adverse to the best interests of the child and that federal legislation should be enacted to facilitate international adoption rather than to restrict it).

142. *Id.*

143. *See* Carroll, *supra* note 60, at 292–93 (arguing that adoptive parents already undergo parental education and that “there is almost no adoptive parent who would report being unfamiliar with the special problems that face adoptive families in adjusting to a new family life”).

adoptee's health and mental status may contain material inaccuracies.¹⁴⁴ These prospective parents should at least be informed of the prevalence of these inaccuracies.

Federal legislation that mandates extensive parental education would ensure that the adoptive parents are aware of the short and long-term risks associated with international adoption, would allow the parents to prepare for such risks, and would inform parents where to turn in the event that they need help with the child postadoption.

2. Postadoption: Adoption Services Provider Readoption Requirement

Another potential cause of rehoming is that adoption service providers fail to diagnose and disclose accurate information regarding the orphaned child. The inaccuracies contained within these reports re-highlight the importance that the parents undergo parental education so that they are aware of the risks of international adoption. In addition to increased parental education requirements, federal legislation should be enacted to require that adoption services providers offer readoption services at no cost if the readoption is a result of a material inaccuracy contained in the child's record.¹⁴⁵

Currently, adoption service providers must only offer readoption services if an adoption is disrupted prior to the date of final adoption.¹⁴⁶ Thus, this proposal extends the readoption obligation past the date of final adoption.¹⁴⁷ This will ensure that adoption service providers bear the cost of their mistakes rather than adoptive families, who may not be able to provide for undisclosed material conditions. Thus, the readoption extension will incentivize adoption service providers to provide accurate and thorough backgrounds on orphaned children, while ensuring that the adoptive parents are given all pertinent information regarding the adoption.

Again, critics of this legislation are likely to raise the argument that the readoption extension creates a barrier to adoption because it will increase the costs of adoption service providers, and therefore, will

144. See EVAN B. DONALDSON ADOPTION INST., *supra* note 66, at 21 (“[I]n a study of 259 families adopting from foster care, 58% reported getting insufficient information on the child, and 37% reported the child's problems were more serious than the placement agency originally described.”).

145. Material inaccuracies could include undisclosed severe behavioral problems, undisclosed severe health problems, or undisclosed mental health issues, etc.

146. 22 C.F.R. § 96.50(d) (2015) (“If counseling does not succeed in resolving the crisis and the placement is disrupted, the agency or person assuming custody of the child assumes responsibility for making another placement of the child.”).

147. Two years may be an appropriate amount of time to extend this requirement because it would allow the child and the adoptive family to attempt to resolve the issue.

result in higher costs for international adoptions.¹⁴⁸ Because the cost of adoption will increase, critics may argue that fewer parents will adopt internationally, which is contrary to the best interests of orphaned children.¹⁴⁹ Yet, this is not so. The readoption extension may result in increased costs for international adoptions. However, it will provide assurances to adoptive parents that they will not have to bear the financial or emotional costs of an undisclosed medical, emotional, or behavioral condition. Without this assurance, adoptive parents may be deterred from international adoption because of the increased parental education requirement. Also, the readoption extension will ensure placement in a home that is financially and emotionally capable of providing for the child's medical, emotional, and behavioral conditions. In short, this provision protects the best interests of the child and the adoptive family.

3. Postadoption: Expanding Postadoption Services

One of the main problems with rehomings is that the power of attorney document does not provide any notice to the state that a transfer of custody has occurred.¹⁵⁰ In order to solve this problem, federal legislation should be passed that requires adoption service providers to periodically check in on the status of the child as a condition of remaining an approved adoption service provider by the Department of State. The legislation should require that the adoption service provider periodically contact the parents to obtain updates on the child's status. Further, the adoption service provider should require that the updates contain some sort of geographical indication of where the child resides.¹⁵¹ This geographical indication could be as little as a report card and would be used to determine whether the adopted child still resides in the same geographical location as the adoptive family. If the family fails to provide sufficient evidence with appropriate geographic indications, the adoption service provider would then be required to notify the state's child welfare agency and an investigation would ensue into whether rehomings has occurred.¹⁵²

148. See Bartholet, *supra* note 141 (arguing that barriers to international adoption are adverse to the best interests of the child).

149. *Id.*

150. For example, Glenna Mueller used a power of attorney document to transfer custody of her son because "[i]f she handled the matter privately, she reasoned, the state wouldn't have to know and therefore wouldn't investigate her for neglect or abuse." Twohey, *supra* note 11.

151. An example of a geographical indication would be a report card from the school district that the child attends.

152. See *infra* Part III.B (proposing the modification of CAPTA to include a minimum definition of child abuse and neglect that would encompass rehoming and, therefore, requiring a mandatory report by an adoption service provider

This legislation would provide a check on an unrestricted power of attorney document, because the state would eventually receive notice that the child no longer resides with the adoptive family.¹⁵³ The state child welfare agency would then be able to investigate the rehoming and take appropriate action based on the results of the investigation.

Similarly, federal legislation should be passed to expand adoption service providers' obligations to provide postadoption services in order to remain approved by the U.S. Department of State. Specifically, adoption service providers should be required to aid adoptive families in seeking postadoption counseling for children and families that are suffering through a difficult transition period. Currently, adoption service providers must aid families in finding qualified counselors "[w]hen a placement . . . is in crisis in the post-placement phase" before the adoption is finalized.¹⁵⁴ This proposal would simply extend this obligation for a period of time after the adoption has been finalized. Moreover, the adoption service provider need not render the actual services to the family. Instead, it must assist the adoptive family in finding "counseling by an individual with appropriate skills to assist the family in dealing with the problems that have arisen."¹⁵⁵ Because many adoptive families blame the lack of counseling services available for their decision to rehome, this proposal is intended to ensure that adoptive service providers continue to guide families to appropriate resources after the adoption has been finalized.¹⁵⁶

Overall, all of these proposals seek to eliminate the underlying causes of rehoming in the context of international adoption. The thirty-hour-parental-education requirement would ensure that adoptive parents are aware of the increased risk of disruption in international adoptions. The readoption extension proposal would incentivize adoptive service providers to deliver adoptive parents with more accurate background information regarding the child and would provide assurances to adoptive parents. The proposal requiring postfinalization check-ins and guidance would provide a check on power of attorney documents and would ensure that adoptive families have access to appropriate counseling resources. In tandem, these proposals would greatly reduce the prevalence of rehoming for international adoptees.

to the state child welfare agency if it has a reasonable suspicion of child abuse and neglect). Lack of an adequate geographical indication would constitute a reasonable suspicion of child abuse and neglect under the modified definition that encompasses rehoming.

153. This assumes that the adoptive parents do not rehome the child in the same school district that they reside in.

154. 22 C.F.R. § 96.50(c) (2015).

155. *Id.*

156. Again, an appropriate period of time may be two years post adoption finalization.

4. Supplementary State Actions: Safe Haven Programs

As an alternative to the three pieces of federal legislation described below in Part III.A.1–3, some commentators have argued that the states should create a program, similar to an infant safe haven law, which would allow parents to relinquish their adoptive children within a certain time period.¹⁵⁷ These programs would allow parents to relinquish their adoptive children, within a certain period of time, at a state sanctioned safe haven locations, such as hospitals or fire departments.¹⁵⁸

These state safe haven laws may be a good idea because they provide adoptive parents with a substitute to rehoming. But these safe haven laws should not supplant federal legislation that increases parental education requirements or expands postadoption services. Rather, states should supplement the federal legislation described below with state safe haven programs. Adoptive parents who are not qualified to adopt internationally may be deterred from adopting as a result of the increased education requirements. Those that still choose to adopt, and are incapable of acting in the best interests of the adopted child, would be able to obtain postadoption services from their adoption service provider to attempt to salvage the adoption. If these postadoption services fail, the parents could then relinquish the child to the state through the state's safe haven program.

In short, the states should be left to decide if safe haven programs should be available to adoptive parents. But, contrary to existing commentary on safe haven laws,¹⁵⁹ these safe haven programs are consistent with the proposed federal legislation described below in Part III.A.1–3. The federal education requirement would reduce the number of unqualified parents from adopting internationally. And the federally mandated postadoption service expansion would provide support for adoptions that are at risk of failure. These federal proposals are proactive measures, which seek to decrease the number of failed adoptions. As such, these federal proposals will reduce the number of failed adoptions, and therefore, result in fewer parents using the state safe haven programs. Thus, expansion of state safe haven programs to adoptees should be viewed as a supplement to the federal proposals described below, rather than an alternative.

157. See Carroll, *supra* note 60 (claiming that increasing pre- and postadoption services are not practical solutions to eliminating rehoming and arguing that states should expand safe haven laws to allow for adoptive parents to relinquish their children to the state).

158. *Id.* at 281.

159. See *id.* (discussing problems with private remedies for unsuccessful adoptions and potential solutions).

B. CAPTA Modification Scheme

While international adoptees account for a majority of rehomed children, many children are rehomed that are not international adoptees. In order to prevent all rehoming, some have proposed that the ICPC should be codified in federal statute so as to “create standard penalties and enforcement.”¹⁶⁰ While this could help in reducing the prevalence of rehoming, it is likely that there would be problems with its implementation. Much of the value of the adoption of ICPC as federal law would result from uniform enforcement and penalties.¹⁶¹ However, the ICPC would not address all instances of rehoming because it only affects interstate transfers of custody. Given this shortfall, Congress should act to modify existing federal legislation, CAPTA, because it would impact all instances of rehoming and it is a more effective mechanism for uniform enforcement and penalties. Congress has the authority to modify CAPTA under its Spending Powers.

As discussed in Part II.B, CAPTA is a federal statute that provides federal funds to state child welfare programs if the state complies with CAPTA’s eligibility requirements.¹⁶² Currently, CAPTA does not contain a minimum definition of child abuse and, thus, allows the states to create their own definitions for the term.¹⁶³ However, Congress should modify CAPTA to create a minimum definition of child abuse, and should include rehoming within this definition. If enacted, Congress will extend the protections provided by state child abuse statutes to cover all instances of rehoming. The creation of this definition within CAPTA will have a profound impact on all instances of rehoming because (1) all states have mandatory child abuse reporting statutes,¹⁶⁴ (2) it will extend the data collection functions of the national clearinghouse to include instances of rehoming,¹⁶⁵ and (3) it will utilize the national clearinghouse’s training resource system to train applicable professions on rehoming.¹⁶⁶

CAPTA requires that, in order to receive the federal funds, all states have state statutes that mandate child abuse reporting for certain

160. Twohey, *supra* note 19 (“Some child welfare officials recommend that Congress make the interstate agreement federal law.”); *see also* Huber, *supra* note 6, at 2 (“[C]hild welfare officials are advocating to strengthen the enforcement of federal laws that protect adopted children, including the [ICPC].”).

161. This solution may present some federalism concerns because states have historically been responsible for this area of family law.

162. *See supra* Part II.B. (discussing the legality of rehoming).

163. Chang, *supra* note 1.

164. 42 U.S.C. § 5106a(b)(2)(B)(i) (2012).

165. 42 U.S.C. § 5104(b)(5)(A) (2012).

166. 42 U.S.C. § 5104(b)(7) (2012).

professionals.¹⁶⁷ As stated in Part II.B, these professionals often include teachers, law enforcement professionals, social workers and health care workers.¹⁶⁸ Further, these statutes often mandate reporting if the professional has a reasonable suspicion—rather than actual knowledge—of child abuse.¹⁶⁹ Thus, modifying CAPTA to include a minimum definition of child abuse that encompasses rehoming would extend state mandatory reporting statutes to instances of rehoming. As such, applicable professionals would have a duty to report any reasonable suspicion of rehoming to the state child welfare agencies in order to comply with CAPTA and the state reporting law. As all fifty states receive federal funds under CAPTA,¹⁷⁰ this would create a mandatory system of reporting for all instances of rehoming throughout the United States.¹⁷¹ Thus, incorporating rehoming into the minimum definition of child abuse would greatly reduce the prevalence of rehoming.

Similarly, incorporating rehoming into the minimum definition of child abuse would allow for the national clearinghouse to collect data on the prevalence of rehoming. Currently, no federal agency is responsible for tracking the frequency of rehoming. If Congress enacts this modified definition, the national clearinghouse established by CAPTA in 42 U.S.C. § 5104, would be required to “maintain and disseminate information relating to” rehoming.¹⁷² This would provide insight into how often rehoming occurs, and would enable the national clearinghouse to “maintain and disseminate information on best practices used for achieving improvements in child protective systems” geared to rehoming.¹⁷³

Lastly, Congress’s enactment of this definition would enable the national clearinghouse to “collect and disseminate information relating to various training resources available at the State and local level . . . to assist in training law enforcement, legal, judicial, medical, mental health, education, child welfare, substance abuse treatment services, and

167. 42 U.S.C. § 5106a(b)(2)(B)(i).

168. *See supra* Part II.B (discussing professions in which reporting is mandatory under many state statutes).

169. *See supra* note 120 (providing examples of statutes under which professionals are required to act when they have “reasonable cause to suspect” child abuse or neglect).

170. CHILDREN’S BUREAU, REPORT TO CONGRESS ON THE EFFECTIVENESS OF CAPTA STATE PROGRAMS AND TECHNICAL ASSISTANCE (2013). The District of Columbia and the Commonwealth of Puerto Rico also receive federal funds under CAPTA.

171. The system of reporting would be mandatory throughout the United States because CAPTA requires all states that receive federal funds from CAPTA (all fifty states) to have mandatory reporting statutes.

172. 42 U.S.C. § 5104(b)(5) (2012).

173. 42 U.S.C. § 5104(b)(4) (2012).

domestic violence services personnel.”¹⁷⁴ Part of the problem surrounding rehoming is the lack of awareness by the aforementioned professionals.¹⁷⁵ By modifying the definition within CAPTA, the national clearinghouse would become responsible for providing training materials to professionals who are largely unaware of the existence of rehoming. This would increase the professionals’ awareness of rehoming and would enable the child welfare systems to be vigilant in detecting occurrences of rehoming. This may be the most useful tool in CAPTA’s arsenal because without training these professionals on the specifics of rehoming and how to detect it, the mandatory reporting laws would be futile.¹⁷⁶

Overall, if CAPTA is modified to include a minimum definition of child abuse that encompasses rehoming, occurrences of rehoming will be greatly reduced because of CAPTA’s mandatory reporting requirements, its information collecting functions, and its training dissemination system.

CONCLUSION

Rehoming must be stopped. Unfortunately, there is not an easy way to stop rehoming given the complicated interplay of federal, state, and international law. Currently, internationally adopted children account for seventy percent of the instances of rehoming. In order to reduce the prevalence of rehoming of international adoptees, federal legislation targeting the actions of adoption service providers pre- and postadoption should be instituted. These legislative initiatives could be enacted pursuant to Congress’s powers over immigration and citizenship. Similarly, in order to reduce all instances of rehoming, existing federal legislation in CAPTA should also be modified to allow for state agencies to investigate instances of rehoming. Congress would have authority to modify CAPTA pursuant to its spending powers. If all of these measures are implemented at the federal level, incidences of rehoming should be greatly reduced.

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174. 42 U.S.C. § 5104(b)(7)(B) (2012).

175. See Twohey, *supra* note 11 (referring specifically to the FBI agent discussed in the Twohey investigative reports who was unaware of the existence of rehoming).

176. In other words, the professionals could not comply with the mandatory reporting laws if they were unaware of what rehoming is.

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